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UNITED STATES OF AMERICA
for the use of
MODULAR SPACE CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
for the use of
MODULAR SPACE CORPORATION,
 	
                                        Plaintiff,
 	
v.
 	
PATRICIA I. ROMERO, INC. and
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
 	
                                        Defendants.
	Case No.: **'19CV0191 BEN KSC**
	
	COMPLAINT
	
	Government Collection

        The United States of America, for the use of Modular Space Corporation ("ModSpace"), brings this action for payment of $172,611.96 for work performed and accepted on a federal project in the State of California. ModSpace asserts a breach of contract claim against Patricia I. Romero, Inc. d/b/a Pacific West Builders ("PacWest") and a Miller Act (40 U.S.C. § 3131, et seq.) payment bond claim against PacWest's

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[Case No.]

1   surety, Fidelity and Deposit Company of Maryland ("F&D").

PARTIES

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3   1.   ModSpace is a Delaware corporation that provides, among other things,

4   design-build construction services on federal, state, and private construction projects to

5   its clients.   ModSpace's principal office is located at 1200 Swedesford Road, Berwyn,

6   Pennsylvania. As required by the Miller Act, ModSpace asserts its Miller Act payment

7   bond claim in the name of the United States of America. See 40 U.S.C. § 3133(b)(3)(A).

8   2.   Upon information and belief, PacWest is a California corporation with a

9   principal place of business at 1248 Coolidge Avenue, National City, California 91950.

10   PacWest is engaged in the business of construction contracting.

11   3.   Upon information and belief, F&D is a Maryland corporation with its

12   principal place of business at 1400 American Lane, Tower I, 18th Floor, Schaumburg,

13   Illinois 60196. F&D is a surety company generally engaged in the business of furnishing

14   bonds.

JURISDICTION AND VENUE

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16   4.   The Court has subject matter jurisdiction over this action pursuant to 40

17   U.S.C. §§ 3131 & 3133, 28 U.S.C., § 1332(a), and 28 U.S.C., § 1337(a).

18   5.   Venue is proper. See 40 U.S.C. § 3133(b)(3)(B) (directing that this action

19   be brought "in the United States District Court for any district in which the contract was

20   to be performed and executed, regardless of the amount in controversy.").

FACTUAL BACKGROUND

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22   6.   Upon information and belief, PacWest executed prime contract number

23   N62473-11-D-0065 0021 (the "Prime Contract") with the United States Department of

24   the Navy ("United States") to serve as the general contractor for a project known as

25   MCMH Double Team Clinic, MCB Camp Pendleton project in San Diego County,

26   California (the "Project").

27   7.   PacWest, as principal, and F&D, as surety, executed a payment bond

28   (Payment Bond No. 9176779) required by the Miller Act securing payment of labor and

[Case No.]

1 materials furnished on the Project (the "Bond").

2 8. On or about January 23, 2017, PacWest entered into a subcontract (the

3 "Subcontract") with ModSpace to design, manufacture, and erect the modular office

4 trailers for the Project.

5 9. The original Subcontract price was $1,306,460.00.

6 10. During the course of the Project, PacWest and ModSpace agreed to reduce

7 the Subcontract price by $7,922.74, resulting in an adjusted Subcontract price of

8 $1,298,537.26.

9 11. ModSpace timely and properly completed its work under the Subcontract

10 until the project was completed and accepted by the United States.

11 12. To date, PacWest has paid ModSpace $1,125,925.30, leaving an unpaid

12 earned Subcontract balance of $172,611.96.

13 13. ModSpace has made several demands upon PacWest for payment of its

14 unpaid earned Subcontract balance.

15 14. To date, however, PacWest has failed and/or refused to pay ModSpace its

16 earned Subcontract balance of $172,611.96.

17 15. Pursuant to Paragraph 18 of the General Conditions Clauses to Addendum 7

18 of the Subcontract, ModSpace is entitled to recover its attorneys' fees and costs if it is the

19 prevailing party in this action to enforce the Subcontract.

20 16. As a result of PacWest's nonpayment, ModSpace is entitled to make demand

21 upon F&D for payment of ModSpace's earned Subcontract balance of $172,611.96

22 pursuant to the Bond.

23 17. ModSpace therefore brings this action on the Bond to recover payment for

24 work performed by ModSpace and accepted at the Project, for which ModSpace has not

25 received payment.

26 18. Upon information and belief, PacWest has been paid by the United States for

27 the work for which ModSpace has demanded payment.

28 19. All conditions precedent to the maintenance of this action have been

3

1   performed.

FIRST CLAIM FOR RELIEF: BREACH OF CONTRACT

(ModSpace v. PacWest)

20.   ModSpace incorporates by reference and re-alleges the allegations of paragraphs 1 through 19, inclusive, as though fully set forth herein.

21.   PacWest failed to perform its contractual obligations under the Subcontract to timely pay ModSpace its earned Subcontract balance of $172,611.96.

22.   PacWest's actions and conduct constitute a material breach of the Subcontract.

23.   As a direct and proximate result of PacWest's material breach of the Subcontract, ModSpace has suffered damages in an amount to be proven at trial, but no less than $172,611.96, plus all costs, interests, attorneys' fees and other damages.

WHEREFORE, ModSpace requests that it be awarded a judgment under Count I against PacWest thereby entitling ModSpace to recover damages in an amount in excess of $172,611.96, plus interest, costs, and attorneys' fees, and such further and additional relief as the Court may deem just and proper.

SECOND CLAIM FOR RELIEF : MILLER ACT PAYMENT BOND CLAIM

(United States for the Benefit of ModSpace v. F&D)

24.   ModSpace incorporates by reference and re-alleges the allegations of paragraphs 1 through 19, inclusive, as though fully set forth herein.

25.   PacWest and ModSpace executed a valid Subcontract pursuant to which PacWest agreed to pay ModSpace for work performed and accepted at the Project.

26.   ModSpace fully and completely performed its obligations under the Subcontract and is entitled to be paid its earned Subcontract balance of $172,611.96.

27.   ModSpace is not in breach of the Subcontract and satisfied all conditions necessary to assert a claim under the Miller Act.

28.   In breach of the Subcontract, PacWest failed and/or refused to pay the earned Subcontract balance for Subcontract work which ModSpace performed and which

[Case No.]

1   was accepted at the Project.

2   29.   ModSpace is a proper claimant under the Bond.

3   30.   At least 90 days have elapsed since ModSpace last performed work for

4 which this claim is made, but one year has not elapsed since ModSpace last performed

5 work for which this claim is made. See 40 U.S.C. § 3133(b)(1) & (b)(4).

6   31.   ModSpace is entitled to payment of the earned – but unpaid – Subcontract

7 balance of $172,611.96 due for work performed by ModSpace pursuant to the Miller Act.

8   32.   F&D is obligated under the Bond to pay ModSpace for the Subcontract work

9 performed by ModSpace and for which PacWest has failed and refused to make payment.

10   33.   F&D has failed to fulfill its obligation under the Bond to pay ModSpace for

11 the Subcontract work furnished by ModSpace in furtherance of PacWest's work under

12 the Prime Contract.

13   34.   As PacWest's payment bond surety, F&D's liability extends to all sums

14 justly due to ModSpace up to the penal sum of the Bond, including, without limitation,

15 costs, interest, and attorneys' fees.

16   35.   ModSpace is entitled to payment in the amount of $172,611.96, plus interest,

17 costs and attorneys' fees.

18   **WHEREFORE**, ModSpace requests that it be awarded a judgment under the

19 Second Claim for Relief against F&D thereby entitling ModSpace to recover damages in

20 an amount in excess of $172,611.96, plus interest, costs, and attorneys' fees, and such

21 further and additional relief as the Court may deem just and proper.

22 Dated: January 28, 2019

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[Case No.]

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*Counsel for Plaintiff UNITED STATES OF
AMERICA for the use of MODULAR SPACE
CORPORATION*

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[Case No.]

CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS	DEFENDANTS
MODULAR SPACE CORPORATION 1200 Swedesford Road Berwyn, Pennsylvania 19312	PATRICIA I. ROMERO, INC. 1248 Coolidge Avenue, National City, California 91950 **'19CV0191 BEN KSC** FIDELITY AND DEPOSIT COMPANY OF MARYLAND 1400 American Lane, Tower I, 18th Floor, Schaumburg, Illinois 60196
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Chester County, PA (EXCEPT IN U.S. PLAINTIFF CASES)	COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT San Diego County, CA (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Joshua Tropper (# 112240) jtropper@bakerdonelson.com BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C. Monarch Plaza, Suite 1600 3414 Peachtree Road Atlanta, GA 30326	ATTORNEYS (IF KNOWN) Micaela Banach, Esq. Noon Lance Boyer & Banach, LLP 701 Island Avenue, Suite 400 San Diego, CA 92101 Attorneys for Patricia I. Romero, Inc. ⊞

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

○ 1 U.S. Government
Plaintiff

○ 3 Federal Question
(U.S. Government Not a Party)

○ 2 U.S. Government
Defendant

◉ 4 Diversity
(Indicate Citizenship of
Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR
PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	◉ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	◉ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT
(Place an X in one category, A-N, that best represents your Cause of Action and **one** in a corresponding Nature of Suit)

○ **A. Antitrust**

☐ 410 Antitrust

○ **B. Personal Injury/
Malpractice**

☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Federal Employers Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury
☐ 362 Medical Malpractice
☐ 365 Product Liability
☐ 367 Health Care/Pharmaceutical
Personal Injury Product Liability
☐ 368 Asbestos Product Liability

○ **C. Administrative Agency
Review**

☐ 151 Medicare Act

Social Security
☐ 861 HIA (1395ff)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))
Other Statutes
☐ 891 Agricultural Acts
☐ 893 Environmental Matters
☐ 890 Other Statutory Actions (If
Administrative Agency is
Involved)

○ **D. Temporary Restraining
Order/Preliminary
Injunction**

Any nature of suit from any category
may be selected for this category of
case assignment.

(If Antitrust, then A governs)

○ **E. General Civil (Other)**   OR   ○ **F. Pro Se General Civil**

Real Property
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent, Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

Personal Property
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property
Damage
☐ 385 Property Damage
Product Liability

Bankruptcy
☐ 422 Appeal 27 USC 158
☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
☐ 535 Death Penalty
☐ 540 Mandamus & Other
☐ 550 Civil Rights
☐ 555 Prison Conditions
☐ 560 Civil Detainee – Conditions
of Confinement

Property Rights
☐ 820 Copyrights
☐ 830 Patent
☐ 835 Patent – Abbreviated New
Drug Application
☐ 840 Trademark

Federal Tax Suits
☐ 870 Taxes (US plaintiff or
defendant)
☐ 871 IRS-Third Party 26 USC
7609

Forfeiture/Penalty
☐ 625 Drug Related Seizure of
Property 21 USC 881
☐ 690 Other

Other Statutes
☐ 375 False Claims Act
☐ 376 Qui Tam (31 USC
3729(a))
☐ 400 State Reapportionment
☐ 430 Banks & Banking
☐ 450 Commerce/ICC
Rates/etc.
☐ 460 Deportation

☐ 462 Naturalization
Application
☐ 465 Other Immigration
Actions
☐ 470 Racketeer Influenced
& Corrupt Organization
☐ 480 Consumer Credit
☐ 490 Cable/Satellite TV
☐ 850 Securities/Commodities/
Exchange
☐ 896 Arbitration
☐ 899 Administrative Procedure
Act/Review or Appeal of
Agency Decision
☐ 950 Constitutionality of State
Statutes
☐ 890 Other Statutory Actions
(if not administrative agency
review or Privacy Act)

○ **G. Habeas Corpus/ 2255**	○ **H. Employment Discrimination**	○ **I. FOIA/Privacy Act**	○ **J. Student Loan**
☐ **530 Habeas Corpus – General** ☐ **510 Motion/Vacate Sentence** ☐ **463 Habeas Corpus – Alien Detainee**	☐ **442 Civil Rights – Employment** (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ **895 Freedom of Information Act** ☐ **890 Other Statutory Actions** (if Privacy Act) *(If pro se, select this deck)*	☐ **152 Recovery of Defaulted Student Loan** (excluding veterans)
○ **K. Labor/ERISA (non-employment)**	○ **L. Other Civil Rights (non-employment)**	⊙ **M. Contract**	○ **N. Three-Judge Court**
☐ **710 Fair Labor Standards Act** ☐ **720 Labor/Mgmt. Relations** ☐ **740 Labor Railway Act** ☐ **751 Family and Medical Leave Act** ☐ **790 Other Labor Litigation** ☐ **791 Empl. Ret. Inc. Security Act**	☐ **441 Voting** (if not Voting Rights Act) ☐ **443 Housing/Accommodations** ☐ **440 Other Civil Rights** ☐ **445 Americans w/Disabilities – Employment** ☐ **446 Americans w/Disabilities – Other** ☐ **448 Education**	☐ **110 Insurance** ☐ **120 Marine** ☐ **130 Miller Act** ☐ **140 Negotiable Instrument** ☐ **150 Recovery of Overpayment & Enforcement of Judgment** ☐ **153 Recovery of Overpayment of Veteran's Benefits** ☐ **160 Stockholder's Suits** ☒ **190 Other Contracts** ☐ **195 Contract Product Liability** ☐ **196 Franchise**	☐ **441 Civil Rights – Voting** (if Voting Rights Act)

V. ORIGIN

⊙ **1 Original Proceeding**   ○ **2 Removed from State Court**   ○ **3 Remanded from Appellate Court**   ○ **4 Reinstated or Reopened**   ○ **5 Transferred from another district (specify)**   ○ **6 Multi-district Litigation**   ○ **7 Appeal to District Judge from Mag. Judge**   ○ **8 Multi-district Litigation – Direct File**

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
Miller Act (40 U.S.C. § 3131, et seq.) / Breach of Contract

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	**DEMAND $** 172,611.96 **JURY DEMAND:**	Check <u>YES</u> only if demanded in complaint **YES** ☐ **NO** ☒
VIII. RELATED CASE(S) IF ANY	(See instruction)	**YES** ☐ **NO** ☒	If yes, please complete related case form
DATE: _____01/28/2019_____	**SIGNATURE OF ATTORNEY OF RECORD**	/s/ Joshua Tropper	

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I.   COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III.   CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed <u>only</u> if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV.   CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the <u>primary</u> cause of action found in your complaint. You may select only <u>one</u> category. You <u>must</u> also select <u>one</u> corresponding nature of suit found under the category of the case.

VI.   CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII.   RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.